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In the Supreme Court of the United States

OCTOBER TERM, 1997

THE METROPOLITAN TRANSPORTATION AUTHORITY,
PETITIONER,

v.

NEW YORK MAGAZINE, A DIVISION OF
PRIMEDIA MAGAZINES, INC.,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent attempts to hide the importance and breadth of the Second Circuit's holding by focusing myopically on the circumstances of this case. Respondent thus suggests a host of fact-specific reasons why it *might* have deserved to prevail in this litigation: that the MTA allegedly failed to follow its own regulations (Opp. 4-5); that respondent's contractual rights were violated (Opp. 2); that the advertisement in question was a "political satire" and not a product endorsement (Opp. 5); that the advertisement ran on the outside, not the inside, of buses (Opp. 11 n.4); that the MTA did not establish sufficient governmental justification for its refusal to run this particular advertisement (Opp. 2-3).[1] Respondent also complains that the record below is inadequate to resolve some or all of these issues (Opp. 3, 9).

But respondent *actually* prevailed in the Second Circuit on the basis of a broad constitutional holding that not only severely limits the MTA's ability to enforce any limit on the use of advertising space in its transit system, but also has ramifications for all transit agencies. As we explain in the Petition, the court of appeals held that the MTA's action was unconstitutional for two reasons: (1) that because the advertising space on MTA vehicles is an unlimited public forum, each of the categories of excluded speech in the Advertising Standards must be justified by a compelling governmental interest; and (2) that because refusal of advertisements is a form of prior restraint, the MTA may not decline to run any advertisement — even one constituting commercial speech — without advance judicial approval. Indeed, notwithstanding its diversionary focus on the facts of the case,

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[1] Respondent states, several times, that its advertisement was rejected pursuant to a Standard that prohibits an "advertisement that *may* violate § 50 of the New York Civil Rights Law" (Opp. 4, 13, 18, 19 (emphasis in original)). This is incorrect. The Standard in question prohibits any advertisement that "violates § 50 of the New York Rights Law." To the extent that respondent's argument depends on this error (see, *e.g.*, Opp. 19), it is without merit. Moreover, contrary to insinuations in the Brief in Opposition that the advertisement was excluded because of political pressure from the Mayor's Office (see Opp. 5, 16-17), the district court found, based on undisputed facts, that "the Ad was excluded because [the MTA] Chairperson agreed with the Deputy Mayor that the Ad violated the terms of Section 50." Pet. App. 38a.

respondent *agrees* with our characterization of the Second Circuit's holding, acknowledging that under the court of appeals' decision the MTA's Advertising Standards "must be justified as exclusions [that are] narrowly tailored to serve a compelling governmental interest" (Opp. 7) and that the MTA's rejection of the Advertisement was invalidated by the court of appeals because "the MTA failed to carry its heavy burden of justifying the imposition of a prior restraint" (Opp. 3).

Should the Court grant review and reverse the Second Circuit's remarkable holdings, New York Magazine would be free, on remand, to raise any other issues that it may think are implicated by the facts of this case. But the existence of these other potential issues does not detract from the fact that the decision below is of importance far beyond the specific factual circumstances of this case. The court of appeals' holdings raise pure issues of constitutional law, not dependent on the record. They have great precedential importance, with potentially disruptive effects for government agencies wherever the Second Circuit's ruling may be accepted. And they conflict with decisions of this and other courts. Those holdings therefore warrant review by this Court.

It should be added that respondent is wrong in its assertion (Opp. 3, 8-9) that review is inappropriate because this case involves a preliminary injunction and therefore is in an interlocutory posture. Absolutely nothing in the analysis of the court of appeals turned either on the preliminary nature of the injunction sought by respondent or on the state of the record; the court issued a categorical legal holding that resolved issues of First Amendment law. There is no prospect of a different outcome on remand to the district court. The MTA — and all other transit authorities subject to the Second Circuit's rule — therefore are now governed by the holding announced by the court of appeals. In these circumstances, where there is nothing to be gained by delay and the decision below is having an immediate and far-reaching impact, review by this Court is in order. See R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 196-197 (7th ed. 1993).

I. The Forum Issue

As explained more fully in the Petition, the Second Circuit's holding on the forum issue is based on two highly questionable

propositions. The Brief in Opposition defends both of those propositions, though it supplies neither authority nor reasoning (other than paraphrase of the Second Circuit opinion) to support them.

First, the court below held that MTA advertising space is a public forum because the MTA — unlike the transit system in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) — accepts paid political advertisements as well as commercial advertisements. As explained in the Petition (13-15), this holding has no precedential support and is logically indefensible. The MTA, like private, profit-making billboard companies, makes money from selling advertising space to political candidates. No one imagines that private billboard companies cease to operate in a profit-making capacity when they sell their space to political candidates, and there is no reason to think differently of the MTA. Though we made this point in the Petition, respondent offers no response at all.

In its Brief in Opposition, respondent nevertheless endorses the Second Circuit's reasoning that "the fact that the MTA allows political speech serves to underscore the conclusion that the MTA operates the outside of the city buses in a regulatory, rather than a proprietary capacity, and thus intended to open the space to the public at large." Opp. 10. Respondent does not cite any authority for that proposition (other than a quotation from the Second Circuit), nor does it offer any reasoning to support its assertion.

This obviously is a legal question of great importance to transit agencies (and other governmental agencies that sell advertising space) nationwide. If the Second Circuit is correct, transit agencies cannot sell advertising to political candidates or political causes without forfeiting their right, under *Lehman* v. *City of Shaker Heights*, to exercise their discretion to refuse advertising that they reasonably believe would be detrimental to their primary function. Nothing said in the Brief in Opposition diminishes the certworthiness of this aspect of the forum issue.[2]

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[2] Respondent's only attempt to distinguish *Lehman* is the peculiar suggestion that, in supposed contrast to the regime in Shaker Heights, the MTA Advertising Standards do "not restrict [MTA] advertising space by excluding any 'categories' of speech." Opp. 11. This ground also is the

Second, the court of appeals hinged its forum analysis on its claim that each exclusion of a category of speech from a limited public forum must be supported by a compelling governmental interest. Pet. App. 10a. In the Petition, we cited decisions of this Court holding that exclusions of categories of speech within a limited public forum need only be reasonable and viewpoint-neutral to survive First Amendment scrutiny. Pet. 17, citing *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829-30 (1995); *United States* v. *Kokinda*, 497 U.S. 720, 730 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985). In the Brief in Opposition, however, respondent simply ignores this conflict with controlling Supreme Court precedent, describing the Second Circuit's view as "clearly correct" and citing as authority — the Second Circuit itself! Most remarkably, after quoting the Second Circuit's holding, respondent provides the following citation: "Pet. App. 10a (citations omitted)." See Opp. 14. It is telling that the "citation omitted" is one to the *dissenting opinion* of Justice Blackmun in *Cornelius*. In effect, the court of appeals has adopted the view of the *Cornelius* dissent. Such a conflict with this Court's decisions clearly warrants further review, if not summary reversal.[3]

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sole basis on which respondent seeks to distinguish *Rogers* v. *New York Transit Authority*, 680 N.E.2d 142 (N.Y. 1997). See Opp. 11 n.5. But this argument played no part in the Second Circuit's analysis, and in any event is wholly baseless. Respondent may not agree with the Standards, but surely proscriptions on advertisements that promote tobacco products, or that depict minors in sexually suggestive poses, or that invade privacy, are exclusions of certain "categories" of speech; respondent offers absolutely no reason to believe that these sorts of speech are any more or less "categories" of expression for First Amendment purposes than were the political advertisements excluded from the Shaker Heights transit system. In this regard, we note that Shaker Heights did *not* exclude all noncommercial speech. See Pet. 14 n.7.

[3] In arguing to the contrary, respondent asserts that the MTA permits "all categories of speech" and that "[t]he MTA cannot use its regulations to define the limits — and therefore the nature — of its forum, because those limitations are limitations *within* a category of speech." Opp. 13, 14 (emphasis in original). This cryptic *ipse dixit*, however, is unsupported

In defense of the Second Circuit's position, respondent offers the hypothetical of an excluded category of "'magazine promotions parodying the Mayor.'" Opp. 14. It suggests that, under our analysis, such a limitation would be constitutional. But this disregards the fact that, under this Court's holdings, exclusions must be both reasonable and viewpoint neutral. Respondent's hypothetical category is neither. For the same reason, respondent's invocation of *Rosenberger* is off the mark. The University of Virginia's exclusion of "religious" activities was struck down precisely because it was *viewpoint* discriminatory. 515 U.S. at 831 ("viewpoint discrimination is the proper way to interpret the University's objections"). The petitioners in *Rosenberger* did not suggest, and the Court did not hold, that the various other exclusions from the Student Activities Fund, which *were* reasonable and viewpoint neutral, were subject to strict scrutiny. See *id.* at 824-825 (noting other exclusions). The Standard under which respondent's advertisement was rejected is neither unreasonable nor viewpoint discriminatory, and should therefore have been upheld.[4]

Respondent concludes by asserting that "[a]llowing a transit facility such as the MTA to destroy the otherwise 'open' status of a forum by regulating within a category of speech would avoid the constitutional imperative that it justify such exclusion under strict

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by anything in respondent's brief and is insupportable as a matter of law. The MTA, of course, most assuredly does *not* permit "all categories of speech"; it has defined the relevant forum to exclude the categories identified in the Advertising Standards. And as we note above, respondent offers no justification for its bizarre assertion that the Standards do not identify "categories" of expression.

[4] Respondent's assertion that compliance with Section 50 of the New York Civil Rights Law serves no reasonable purpose (Opp. 16) cannot be taken seriously. As the district court stated, "[m]ost states now have laws similar to Section 50," and they serve a number of public purposes. Pet. App. 40a. Respondent will free on remand to pursue its further contention that the "facts of this case * * * strongly suggest impermissible viewpoint discrimination" (Opp. 16) if this Court grants review and reverses the decision below. The Second Circuit decision *now* subject to review was not based on the allegation of viewpoint discrimination, or indeed on any arguments related to the facts of this particular case.

or intermediate scrutiny." Opp. 15-16. But this begs the question. This Court has consistently held that the government does not create an "open forum" except by deliberate act, and that categorical limitations on a limited public forum are subject to review only for reasonableness and viewpoint neutrality. It was inappropriate for the Second Circuit to impose a new and more draconian rule simply because it disagreed with this Court's precedents.

II. The Prior Restraint Issue

The Second Circuit held that refusal of an advertisement constitutes a form of a prior restraint, necessitating the highest level of procedural safeguard, both for "core-protected speech" and for "commercial speech." Pet. App. 13a-14a. Contrary to respondent's suggestion that this holding applies only to some advertisements (Opp. 18), or maybe only to this advertisement (Opp. 23), by its plain terms the Second Circuit's sweeping decision applies to all advertisements — since all advertisements are either "commercial speech" or "core-protected speech," and the Second Circuit expressly declined to distinguish between them. Pet. App. 14a.

Moreover, the Second Circuit's holding requires the MTA to provide procedural protections, including judicial proceedings, in advance of refusing to display an offensive advertisement. The court stated: "These safeguards require, inter alia, that 'the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor,' and that 'a prompt final judicial determination must be assured.'" Pet. App. 13a, quoting *Southern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975). Respondent attempts to minimize the disruption entailed by such a requirement by asserting that "[n]othing in the Court of Appeals decision requires the MTA to undertake 'cumbersome judicial proceedings' in every instance" and that "[n]ot every administrative proceeding challenging an adverse determination under the Standards will necessitate further judicial action." Opp. 19, 20. But respondent fails to explain which proceedings would not "necessitate further judicial action"; perhaps respondent is referring to cases in which one party or the other decides to acquiesce. For its part, the Second Circuit made clear that in *every* adverse

determination, the would-be speaker must be given the *opportunity* for prompt judicial review, and the "censor" (the MTA) must bear the burden of instituting the proceedings. Pet. App. 13a.[5]

This an extraordinary requirement. Respondent pointedly does not deny that it would force a dramatic modification of the practices of every transit agency in the country, that it would obligate the MTA to display harmful and offensive advertisements, and that it would render virtually impossible any meaningful system of advertising regulation. Rather, respondent urges this Court to ignore the systemic consequences of the Second Circuit's constitutional holding, and focus instead on what it says would be the minimal consequences of that holding under the facts of this particular case. See Opp. 23. Respondents are correct that it would be "absurd" to suggest that "displaying this Advertisement would turn the public transit system 'into a no-holds-barred pit of frightening, offensive, degrading, unhealthful or illegal images." *Id.*, quoting Pet. 26.[6] But it is not at all "absurd" to recognize that the Second Circuit's constitutional ruling, which applies across the board to all the Standards and to all potential advertisements, would have that effect. The holding below applies not just to this advertisement, but to tobacco ads, to ads depicting minors in sexually suggestive clothing or poses, and to other ads which — however lawful and legitimate in some settings — could reasonably be viewed by the MTA as harmful to its commercial ihterests. See Brief Amicus Curiae of Agudath Israel of America. By the same

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[5] While respondent declares that "administrative review" may suffice in some circumstances to validate a prior restraint (Opp. 20), the decisions that respondent cites in support of this proposition make clear that prior *judicial* review is essential. See, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965), cited at Opp. 20.

[6] This is not to say that application of the Second Circuit's holding in this particular case would have no ill effects. All persons in New York, including its political figures, are protected from having their names used in the commercial advertising of products without their permission. Some may question why Mayor Giuliani would object to "more publicity" (Pet. App. 22a). But the right to give or withhold consent belongs to the individual.

token, the possibility that there was adequate time in this case to resolve the problem in advance (Opp. 23-24) does not detract from the impact of the Second Circuit's ruling in other cases.

In sum, respondent does not dispute the disruptive effect of the Second Circuit's holding as a general matter, or deny that the decision below raises important and unsettled questions of First Amendment law: the applicability of prior restraint doctrine to commercial speech in a setting where the government must choose among competing potential speakers for limited space. The entire theme of the response is that the particular facts of this case do not pose a major problem. But petitioner is not asking this Court to review the Second Circuit's decision because of the consequences of this particular case; we are asking the Court for review because of the holding's extraordinary implications for the conduct of public transit agencies, not only in New York but also around the country.

CONCLUSION

For these reasons, and the reasons stated in the Petition, this Court should grant the Petition for Certiorari in this case.

Respectfully submitted.

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